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No. 89-440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEBBY CLARDY, as Executrix of the Estate of Eugene Clardy, deceased, and CLARDY REALTY, INC.,
Petitioners,

v.

MARTHA HOFFMAN SANDERS,
Respondent.

REPLY MEMORANDUM

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REPLY MEMORANDUM

Respondent advances a series of arguments against review of the concededly important questions raised by petitioners. On close analysis, however, respondent's arguments demonstrate that this case is an ideal vehicle for consideration of the questions presented.

1. *The "Sui Generis" Argument.* The principal thrust of respondent's argument is that this case is somehow "sui generis" or "unique." Br. in Opp., at 6-17. The points made by respondent, however, do not justify either these labels or the conclusion respondent draws from them.

At bottom, respondent's argument is that the size of the punitive damage award at issue in this case is the product of such a carefully crafted system of restraints on jury discretion to administer punishment that this award could not possibly violate petitioners' due process rights. This is, of course, little more than an argument on the merits that should appropriately be saved for plenary consideration of this case by the Court.

Respondent's argument, however, is relevant at the certiorari stage in a manner that respondent does not fully appreciate. In this Court's selection of a case as a vehicle to consider the due process implications of punitive damages, the Court would presumably want to consider a judgment that is the end-product of what are arguably the most exacting state-law controls over jury discretion, controls that have been considered and developed by a particular State's highest court and legislature in light of this Court's expressed concerns regarding the punitive damage system. In such a case, the Court would have the opportunity to take the measure of the best efforts of a jurisdiction in which large punitive damage awards have become commonplace and, if those efforts fall short, to articulate for all jurisdictions the additional requirements imposed by due process. This is that case.

Furthermore, a cursory examination of how Alabama's assertedly comprehensive mechanisms for ensuring "fair and reasonable" punitive damage awards, Br. in Opp., at 8, function in practice demonstrates the flaw in respondent's conclusion that this case or the Alabama punitive damage system is "unique." The "searching . . . post-trial review," *id.*, of the award at issue produced two opinions. First, the trial court, purporting to apply a long list of "factors" set out at length by respondent in her brief, at 9, issued a so-called "*Hammond*" order[1] that respondent quotes in a truncated fashion in her Statement of the Case, *id.*, at 3, but then virtually ignores thereafter. The full text of that "*Hammond*" order is set forth in the petition, at 11a-12a and 15a-16a; what follows is the paragraph from that order that respondent deleted from her quote:

> Even though the award of 2.75 million dollars for the Plaintiff is a large sum of money, it is not excessive as a matter of law. The Alabama Supreme Court has recently upheld an award of 3.5 million dollars in a wrongful death action where the combined culpability of the defendants appears to be less than in the instant case. *Blackbelt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1986).

The practice in Alabama, as illustrated by the foregoing quotation, does not differ materially from the practice in other jurisdictions. Trial judges in Alabama do not even seriously entertain motions to overturn punitive damage awards as excessive unless, in their subjective judgment, the "culpability" of the defendants before them "appears" to be "less" than the culpability of a defendant in another case in which the Supreme Court of Alabama has affirmed an even larger punitive damage award. How much "less" is not, of course, evident. What is evident is that all of

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[1] *See Hammond* v. *City of Gadsden*, 493 So. 2d 1374 (Ala. 1986).

the "factors" to which the Alabama trial judges are required to pay lip service under the *Hammond* case are similar to the incantations employed in other jurisdictions. In the final analysis, those incantations have very little, if anything, to do with the ultimate determination of "excessiveness."

This is, however, not the end of it, because respondent asserts that, in Alabama, punitive damage awards are also subject to "searching" appellate review to ensure that punishments are not excessive. The appellate review in this case is typical of both Alabama and other jurisdictions. In considering petitioners' excessiveness arguments, the court below—as it has come to do in most cases before it[2]—quoted verbatim in its opinion the "*Hammond*" order issued by the trial court and, citing several of its prior cases (including *Blackbelt Wood Co. v. Sessions*, *supra*) found "no basis for reversal." Pet. for Cert., at 11a-13a.

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[2] In what has become an unmistakable pattern, the court below disposes of the many claims of excessiveness coming before it by quoting in full the text of the *Hammond* order issued by the trial court and then rubber-stamping that order with virtually no discussion. *See, e.g., United American Ins. Co.* v. *Brumley*, 542 So. 2d 1231, 1237 (Ala. 1989); *Alabama Power Co.* v. *Capps*, 519 So. 2d 1328, 1329 (Ala.), *app. dism'd*, 108 S. Ct. 1723 (1988); *Carnival Cruise Lines, Inc.* v. *Goodin*, 535 So. 2d 98, 104 (Ala. 1988); *City Bank of Alabama* v. *Eskridge*, 521 So. 2d 931, 933 (Ala. 1988); *Consolidated Freightways* v. *Pacheco-Rivera*, 524 So. 2d 346, 351 (Ala. 1988); *Fruehauf Corp.* v. *Welch*, 519 So. 2d 502, 506 (Ala. 1988); *Harley Davidson, Inc.* v. *Toomey*, 521 So. 2d 971, 975 (Ala. 1988); *L.W. Johnson & Associates* v. *Rivers Construction Co.*, 532 So. 2d 618, 625 (Ala. 1988); *Waterworks and Sewer Board of City of Ardmore* v. *Wales*, 533 So. 2d 212, 215 (Ala. 1988); *Best Plant Food Products* v. *Cagle*, 510 So. 2d 229, 232 (Ala. 1987); *Ensor* v. *Wilson*, 519 So. 2d 1244, 1274 (Ala. 1987); *Harmon* v. *Motors Insurance Corp.*, 525 So. 2d 411 (Ala. 1987); *Hayes* v. *Payne*, 523 So. 2d 333, 336 (Ala. 1987); *John Hancock Variable Life Insurance Co.* v. *Pierce*, 530 So. 2d 719, 725 (Ala. 1987); *Kabel* v. *Brady*, 519 So. 2d 912, 920 (Ala. 1987); *State Farm Fire and Casualty Ins. Co.* v. *Lynn*, 516 So. 2d 1373, 1380 (Ala. 1987); *Blackbelt Wood Co.* v. *Sessions*, 514 So. 2d 1249, 1265 (Ala. 1986).

Thus, the "searching" appellate review of punitive damage awards in Alabama involves a circular inquiry in which the trial courts look to the punishments the Supreme Court of Alabama has been willing to affirm, while the latter court defers to the judgment of the trial courts and its own prior precedents—including cases pre-dating *Hammond*—in which that court has affirmed large punitive damage awards in cases involving conduct that often bears no resemblance to the conduct at issue in the case before it.[3]

It may be that this Court would hold, after full briefing and argument, that the summary application by the Alabama courts of the elastic "standards" promulgated by the court below in the *Hammond* case provides all of the protections from excessive punishments that are due to defendants in civil punitive damage actions. Such a holding might well validate the punitive damage regimes in other jurisdictions. It may also be, however, that the Court would determine that the Due Process Clause requires more, that courts and juries alike must render their inevitably subjective judgments within a framework of legislatively established ranges of punishment. The Court might also decide that even if no maximum punishment must be established in advance, due process forbids punishment out of proportion to the punishments prescribed by the legislature for similar conduct. These are, however, the merits

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[3] For example, in ratifying the trial court's *Hammond* order in the case at bar, the court below cited, *inter alia*, *American Pioneer Life Ins. Co.* v. *Sandlin*, 470 So. 2d 657 (Ala. 1985), and *National Security Fire & Casualty Co.* v. *Bowen*, 447 So. 2d 133 (Ala. 1983). *Sandlin* involved the affirmance of a $3,000,000 punitive damage award in an insurance fraud case; *Bowen* involved the affirmance of a $1,500,000 punitive damage award against an insurance company on claims of malicious prosecution and outrageous conduct. The apparent message being sent by the court below by its citation to these two cases is that because it has affirmed such large awards in these types of cases, there is virtually no punishment it would not sanction in a wrongful death case.

of the questions presented by this petition, and there is simply no credible argument that these questions are either insubstantial or that this case does not present them clearly and in a setting that is entirely appropriate for their resolution.

Respondent also argues that this case is "sui generis" because in the absence of a compensatory award, there is no basis for measuring the disproportionality between the punishment meted out by the Alabama courts and the actual injury inflicted by Mr. Clardy. Alabama, of course, had the right to fashion an action for wrongful death in which compensation for economic losses is not provided. That Alabama has chosen to do so, however, can hardly serve as a basis for freeing its wrongful death actions from the constraints of the Constitution. If, as respondent suggests, the gross disproportionality between the compensatory and punitive damage awards in a particular case raises a serious due process concern, it would appear to be *a fortiori* that the imposition of a large punitive damage award in the total absence of any ascertained compensatory damages would be of even greater concern under the Due Process Clause.

Furthermore, respondent's argument assumes what respondent herself denies, Br. in Opp., at 16 n.17—that the relationship between the compensatory and punitive awards in a particular case should be regarded as an appropriate test of the constitutionality of a punitive award. In any event, if the Court were to fashion such a test, its application to this case would presumably require Alabama to refashion its wrongful death actions to provide for some calculation of actual injury, whether or not recoverable, in each case. The rule itself could be applied to all punitive damage cases, including this case after appropriate proceedings on remand.

2. *The "Impossibility" Argument.* In an attempt to convince the Court that review of this case would be futile

because there is assertedly no workable constitutional rule that could be fashioned to deal with petitioners' complaint, respondent contends that "it would be impossible for a legislature to devise standards that would specify an individually appropriate punishment for every conceivable case in which punitive damages could be awarded." Br. in Opp., at 12. Respondent's argument is a red herring for several reasons.

First, respondent's argument assumes that petitioners espouse a rule under which legislatures would be required to enact limits on punitive damage awards that are "individually appropriate . . . for every conceivable case . . . ." That is not, however, petitioners' position. Rather, petitioners believe that due process requires that a clearly articulated range of potential punishments be established in advance for the various types of conduct for which punitive damages may be imposed.[4] As respondent herself points out, the Alabama legislature has enacted a number of statutes with legislatively established ranges of punishment under which the conduct of Mr. Clardy—had he lived—and Mr. Kervin could have been evaluated by the State of Alabama. Br. in Opp., at 17 n.19. As these statutes demonstrate, the Alabama legislature is capable of performing this classic legislative function. The threshold problem in the case at bar is that the Alabama legislature, like most other legislatures, has abdicated this area of

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[4] As respondent correctly observes, Br. in Opp., at 18-19 n.24, this Court has recognized the distinction between standardless jury discretion to punish and "the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment *within legally prescribed limits.*" *Giaccio v. Pennsylvania*, 382 U.S. 399, 405 n.8 (1966) (emphasis added). What respondent fails to acknowledge is that there were and are no ascertainable, "legally prescribed limits" on the amount of punishment that could be inflicted on petitioners in this case or the punishments that may be inflicted on the vast majority of other defendants exposed to punitive damage awards in Alabama and other jurisdictions.

legislative decisionmaking to the *ad hoc* decisionmaking of juries and judges.

Second, the problem alluded to by respondent—how precise must state legislatures be in establishing ranges of punishment for particular types of conduct—is not raised directly by this case. Alabama's recent legislative decision to place no limit on punitive damages in this and other classes of cases renders this case representative of the punitive damage systems in force in most States in which the recent flurry of legislative activity has produced but a single, unqualified limit on punitive damages.[5]

Third, respondent's argument does not recognize that this Court could well announce a constitutional rule in this case under which punitive damage awards could not exceed or be disproportional to punishments already prescribed by the Alabama legislature for similar conduct. Indeed, it is noteworthy that the sum of the monetary punishments that could have been imposed on Mr. Clardy upon his conviction for every one of the offenses respondent views as applicable to his conduct in footnote 19 of her brief is $33,100.[6] The punishment imposed by the Alabama courts without observance of the many procedural rights that would have been enjoyed by Mr. Clardy in those judicial proceedings is more than 83 times the aggregate monetary punishment expressly prescribed by the Alabama legislature for that conduct.

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[5] As *amicus curiae* Golden Rule Insurance Company documents in its brief filed in this Court in support of petitioners, only one jurisdiction in this country—Virginia—has established a maximum, ascertainable dollar limit on the amount of punitive damages that may be imposed in all cases in which punitive damages are available. *See* Br. Amicus Curiae of Golden Rule Insurance Company, at 8-9.

[6] A chart detailing the punishments available under the Alabama statutes cited by respondent is contained in the Appendix, *infra*. The $33,100 figure given in the text above assumes that Mr. Clardy would have been a first-time offender.

3. *Joint Liability for Punitive Damages.* Respondent does not suggest what rational state policy might be served by placing, as do Alabama and seven other States, complete discretion in successful punitive damage plaintiffs to enforce their punitive judgments against any one of multiple defendants. Respondent instead argues that this is simply an area of the law that should be left to the States which are, the Court is told, "involved in a salutary common-law search for appropriate solutions to the issue of multiple liability for punitive damages." Br. in Opp., at 24-25. But respondent offers no evidence—nor could she—that Alabama or any of the other States subscribing to this irrational "policy" are likely to bring themselves into conformity with the practice in at least ten other States in which apportionment of punitive damages is the rule.[7] As petitioners demonstrate in the petition, at 22, the court below has expressly acknowledged that its prior cases upholding joint liability may have been "incorrectly decided," but that court has simply "resolutely refused" to change the Alabama rule. *Tatum* v. *Schering Corp.*, 523 So. 2d 1042, 1043 (Ala. 1988). That attitude disposes of

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[7] Respondent purports to draw a distinction between States in which cases "permit" apportionment and States in which apportionment is "required." Br. in Opp., at 24. What relevance such a distinction might have is obscure; the actual practice in the States is the relevant consideration, not the precise choice of words by which the pertinent state courts adopted that practice.

Respondent also mischaracterizes, Br. in Opp., at 23 n.30, the *ratio decidendi* of cases such as *Rubi* v. *Transamerica Title Ins. Co.*, 131 Ariz. 403, 641 P.2d 891, 893 (Ct. App. 1981), in which the appellate court affirmed the decision of the trial court that the codefendant employer of the defendant upon whom punitive damages had been imposed should not also have punitive damages imposed upon it because no punishment was warranted—even though the employer was jointly and severally liable for the compensatory part of the verdict. *Rubi* squarely supports the rationale that petitioners ask this Court to adopt as a constitutional imperative.

respondent's defense of the alleged "salutary search for . . . solutions" to this palpably unjust practice.

Respondent also argues that this case is not an appropriate vehicle for the Court's consideration of this question because Mr. Clardy's widow is not in a position, according to respondent, to argue that her husband's conduct was "less culpable" than that of James Kervin. That *factual* contention is, however, not established by the record in this case because Alabama law does not permit the apportionment of liability for punitive damages and therefore does not authorize the jury to ascertain relative culpability among several defendants.[8]

Furthermore, petitioners' contention is not, as respondent assumes, based solely upon the notion of relative culpability. Regardless of the *degrees* of culpability of the individual defendants, the failure to apportion a punitive damage award levied against multiple defendants unavoidably results in the arbitrary punishment of one defendant for the misconduct of another. By respondent's own assertions, James Kervin was one of two "drunken defendants" who himself had received five speeding tickets during the two years preceding the accident. Br. in Opp., at 1 & 2 n.2. By respondent's own statement, punitive damages "should be individually tailored to the circumstances of each case . . . ." *Id.*, at 12. Yet on September 22, 1989, respondent sent a letter to petitioners demanding

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[8] Respondent twice asserts that the jury "found" that Mr. Clardy "was more culpable" than James Kervin, Br. in Opp., at 5 & 26. Indeed, respondent goes so far as to assert that the "jury found Clardy grossly negligent and the codefendant [James Kervin] negligent." Br. in Opp., at 26 n.34. Respondent apparently bases this assertion on the notations by the jury on the verdict form in which the word "(GROSS)" appeared after the name of petitioner Clardy while the word ("simple)" appeared after the name of James Kervin. However, the jury was never instructed to determine the relative culpability of any of the defendants or how it might go about doing so, and these notations have not otherwise been explained.

payment of the entire judgment, including interest.[9] That payment would have been required but for the stays granted to petitioners first by Justice Stevens and then by the Court. Mr. Clardy could never be punished or deterred because he died almost instantly in the accident. Even if it were rational to punish Mr. Clardy's innocent estate by imposing some portion of a punitive damage award on it, placing the power to decide, as respondent has done, that James Kervin shall never be punished or deterred by having to pay any portion of the $2,750,000 punitive fine advances no discernible state purpose and unjustifiably punishes petitioners for the acts of Mr. Kervin.

4. *Conclusion.* The record in this case presents the questions tendered by petitioners as fully and as clearly as any case likely to come before the Court. The Alabama courts and legislature have recently determined to preserve and perpetuate that State's arbitrary and capricious punitive damage system in most of its particulars notwithstanding this Court's expressed concerns that originated over three years ago in another Alabama case, *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986). Certiorari should be granted and this case set for plenary consideration.

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[9] A copy of that letter was lodged by petitioners with the Clerk of this Court on September 25, 1989, in connection with petitioners' stay application.

October 18, 1989

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APPENDIX

APPENDIX

FINES AND IMPRISONMENT FOR SPECIFIC VIOLATIONS OF THE ALABAMA CODE

Code §	Offense	Imprisonment	Fine
13A-6-2(A)	Murder	Life, or 10-99 years	NTE $20,000
	Class A Felony with lethal weapon	20-99 years	
	habitual/repeat offender	15-20 years	
13A-6-(3)	Manslaughter	2-20 years	NTE $10,000
	Class B Felony with lethal weapon	10-20 years	
	habitual/repeat offender	see Class A Felony	
13A-6-5	Negligent homicide Class A Misdemeanor	NTE 1 year	NTE $1,000
32-5A-190	Reckless driving	5-90 days	$25-$500
	2nd conviction	10 days-6 mos.	$50-$500
32-5A-84	Overtaking on left (misdemeanor)	1st offense: NTE 10 days	NTE $100
		2nd/1yr.: 30 days	$200
		3rd/1yr.: 3 mos.	$500 or both
32-5A-191	DUI	1st offense: NTE 1 year	$250-$1,000
		2nd/5yrs.: NTE 1yr (and fine)	$500-$2,500
		3d/5yrs.: 60 days-1 yr. (60 days (mandatory) and hard labor and fine)	$1,000-$5,000
32-5A-178	Drag-racing	1st offense: 5-90 days	$25-$500
		2nd/1yr.: 10 days to 6 mos.	$50-$500